In construing the avoided-cost language in Section 252(d)(3), the FCC should place that language in the appropriate statutory context. The purpose of identifying avoided costs is to help derive a "wholesale rate[]." The FCC should focus on the meaning of the term "wholesale" as a guide to what Congress intended to achieve by referencing avoided costs. **[NPRM, para. 179.]** By definition, wholesale services or products are provided to other parties for resale in the retail market.[95] There is no reason to believe that Congress used, or thought it was using, the term "wholesale" in a novel or unusual way. If the ILECs are permitted or required to impose any retail costs upon the carriers who seek to resell an ILEC's local exchange services, then the ILECs will not be charging a "wholesale rate[]" as required by Congress in Sections 251(c)(4) and 252(d)(3).

D. The FCC Should Establish A Methodology <u>For Measuring Avoided Retail Costs</u>

[NPRM, paras. 181-182.] The FCC should clarify that all retail costs must be removed from wholesale local exchange rates, and adopt the methodology by which state commissions shall identify avoided costs. <u>First</u>, the FCC should identify all expense categories in the Uniform System of Accounts that relate exclusively to retail services or functions. Those categories

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[95] Webster's Dictionary defines wholesale as "the sale of commodities in quantity usually for resale (as by a retail merchant)." <u>Webster's Ninth New Collegiate Dictionary</u> 1328 (1984).

include Accounts 6611 (Product Management); Account 6612 (Sales); Account 6613 (Product Advertising); and Account 6623 (Customer Services). As regards resale carriers who provide their own operator or directory services, Account 6621 (Call Completion Services) and Account 6622 (Number Services) should be also excluded from the wholesale rate.

Second, the FCC should identify all categories which, while not comprised exclusively of retail costs, vary with the level of an ILEC's retail activities. At a minimum, those accounts include Account 6100 (General Support Expenses); Account 6710 (Executive and Planning); and Account 6720 (General and Administrative), which itself includes Account 6721 (Accounting and Finance); Account 6722 (External Relations); Account 6723 (Human Resources); Account 6724 (Information Management); Account 6725 (Legal); Account 6726 (Procurement); Account 6727 (Research and Development); and Account 6728 (Other General and Administrative). The FCC should require the ILECs to provide data estimating the amount in each of these accounts that is related to retail activities. Also, the FCC should require an adjustment for avoided depreciation expenses due to reduced investment costs.

After calculating total avoided retail costs, the ILECs should derive an average percentage reduction to be applied against all retail local exchange services. Unless an ILEC offers concrete evidence that the extent of avoided retail costs is greater or lesser for a particular retail local exchange service, the ILEC should not be permitted to calculate a different percentage for different retail services. However, if an ILEC succeeds in proving that a smaller percentage of avoided retail costs applies to one or more specific retail services, it should re-calculate a higher percentage reduction off other retail rates to ensure that it cannot, in the aggregate, recover some portion of aggregate retail costs through its wholesale rates. The FCC should encourage state commissions to revisit this issue periodically to ensure that the ILECs have removed all retail-related costs from their local exchange wholesale rates.

In order to add valuable perspective to this process, the FCC and state commissions must recognize that the long distance market has already developed deeply-reduced wholesale products under conditions of vigorous competition, thereby ensuring that all retail costs have been removed from those rates. As the ILECs can now attest, wholesale long distance rates are 50-80% below retail long distance rates. The ILECs in general, and the Bell Companies in particular, stand to be primary beneficiaries of this competitive marketplace. As the ILECs proffer statutory interpretations and proposed rules that would lead to wholesale rates 7-15% below current retail rates, the FCC and state commissions should realize immediately that there is something seriously wrong with the picture the ILECs are painting. The ILECs should not be able to enter the long distance market with wholesale discounts up to 80% while long distance carriers are forced to enter they local resale market (if they can enter it at all) with enormously smaller wholesale discounts for local exchange service. The FCC and state commissions should use the competitive experience of the long distance industry as a check on the natural incentive of the ILECs to minimize the wholesale discount they provide off their monopoly local exchange retail services.

E. The FCC Should Consider Establishing Benchmark Wholesale Reductions For Local Exchange Resale Under Sections 251(c)(4) and 252(d)(3)

The FCC should not leave the calculation of wholesale reductions to the vagaries of ILEC studies and reports. As with TSLRIC cost studies,[96] the ILECs have every incentive to establish incorrect or biased studies to minimize the wholesale reduction for their own competitive gain. The Commission should consider directing the Joint Board to establish a benchmark wholesale reduction that would apply nationwide unless a state commission makes a good-cause showing that a smaller reduction is cost-justified for its state. In this case there is no need to ask state commissions to supply relevant data for calculating the benchmark figure; the ILECs' ARMIS reports already contain sufficient data for the Joint Board and the FCC to calculate a benchmark wholesale reduction with reasonable accuracy. As regards accounts which are only partially comprised of retail

[96] For CompTel's discussion of the TSLRIC benchmark rates, see Section IV.D., <u>supra</u>.

revenues, the FCC and the Joint Board could devise a reasonable mechanism (e.g., a factor reflecting wholesale to retail revenues) for estimating the amount within each account that is related to retail activities. As with the TSLRIC benchmarks, the Joint Board should recommend a benchmark wholesale reduction by November 8, 1996 and the FCC should act on that recommendation immediately thereafter.

In all cases, it should be presumptively reasonable for a state commission to require an ILEC to implement a wholesale reduction greater than the federal benchmark. By establishing benchmark wholesale reductions, the FCC would provide necessary incentives for ILECs to conduct meaningful studies on a state-by-state basis, while enabling other carriers to enter the local exchange market immediately.

F. The FCC Should Prohibit Any Restrictions Upon Wholesale Local Exchange Services That Congress Has Not Authorized Expressly in the 1996 Act

[NPRM, paras. 174-177.] Section 251(c)(4) prohibits the imposition of any "unreasonable or discriminatory conditions or limitations" on the resale of local exchange retail services, with the single exception that state commissions are permitted to adopt rules preventing a carrier from purchasing an ILEC's retail local service which is limited to "a category of subscribers" and then reselling that service to other categories of subscribers. It is imperative that carriers be able to resell any and all retail offerings free from ILEC-imposed restrictions if they are to have a meaningful entry option into the local market. Therefore, the FCC should clarify that no restrictions are permitted on the resale of local exchange retail services except the single restriction expressly authorized by Congress. This is consistent with the FCC's tentative conclusion that "the range of permissible restrictions should be quite narrow." **[NPRM, para. 175.]**

In particular, ILECs should not be permitted to pick and choose which retail offerings will be subject to resale by other carriers. Nor should ILECs be able to prevent a service from being resold by asserting that it is non-compensatory. If a state commission agrees with an ILEC on that point, it can implement the restriction authorized by Congress, namely, that carriers could only resell that service to the same category of subscribers. Other than that restriction, all retail offerings, including promotions and discounts, must be fully available to resellers.

The FCC should adopt a rule preventing an ILEC from withdrawing a service from the marketplace altogether, and hence preventing carriers from purchasing that service at wholesale rates, unless it meets the burden of showing that withdrawing the service is justified by reasons unrelated to the resale of that service by competing carriers and that withdrawing the service will not unreasonably restrict resale opportunities in the local market. Moreover, the FCC should clarify that ILECs cannot create new categories of subscribers unless they meet the same burden. **[NPRM, para. 175.]** Otherwise, the ILECs could create multiple categories of local customers in an effort to discourage local resale through unreasonable market segmentation.

VII. THE FCC SHOULD ADOPT OTHER RULES AND POLICIES NECESSARY TO IMPLEMENT SECTION 251 OF THE 1996 ACT

In this section, CompTel will address various other issues raised by the FCC in the NPRM.

A. The FCC Should Clarify That State Commissions May Order ILECs To Tariff Their Co-Carrier Arrangements Under Section 251(c)

[NPRM, para. 157.] The Commission should affirmatively clarify that state commissions may, consistent with the 1996 Act, order ILECs to file tariffs containing the rates, terms and conditions of co-carrier arrangements pursuant to Section 251(c). At least one state has already adopted such a tariffing requirement.[97] Such a requirement is beneficial because tariffing continues to be a valuable mechanism for disseminating accurate information widely to the public, and tariffing will facilitate negotiations with ILECs under Sections 251 and 252. At the same time, the Commission should also clarify that these tariffs are not Section 203 tariffs which the ILECs are entitled to modify

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[97] See "Commission Decision Adopting Rules," In the Matter of Proposed Rules Regarding Implementation of §§ 40-15-101 Et. Seq. -- Requirements Relating to Interconnection and Unbundling, Docket No. 95R-556T, before the Public Utilities Commission of the State of Colorado, adopted Mar. 29, 1996, at 26-30.

unilaterally. Rather, ILECs may only modify co-carrier arrangements pursuant to the mechanisms established by the 1996 Act and the implementing rules adopted by the FCC and state commissions.

B. The FCC Should Continue To Address Complaints Pursuant to Section 208

[NPRM, para. 41.] The FCC asks for comments on whether parties may file formal complaints with the FCC under Section 208 for violations of the 1996 Act. No provision in the 1996 Act purports to alter the FCC's jurisdiction or authority under Section 208. Nor is Section 208 inconsistent with the establishment of a new co-carrier regime for the provision of services and facilities on an unseparated basis. When a party files a formal complaint alleging a violation of the 1996 Act, the Commission can and should adjudicate that complaint on its merits. To the extent a party files a complaint which in whole or in part implicates a decision by a state authority which is not inconsistent with the 1996 Act, the FCC should properly decline to issue a decision, just as it does today when it refuses to adjudicate complaints raising issues outside its jurisdiction.[98]

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[98] See, e.g., Triax Cablevision, Order Denying Jurisdiction, 1996, W.L. 160842 (March 20, 1996) (dismissal of complaint on grounds that concerns a rate outside the jurisdiction and authority of the Commission); Applications of Contel Cellular and Nynex Mobile Communications, 9 FCC Rcd 5309 (1994) (violation of terms of partnership agreement is
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C. The FCC Should Require ILECs To Submit All <u>Agreements Negotiated Prior To The 1996 Act</u>

[NPRM, para. 48.] The FCC asks whether ILECs should be required to submit agreements negotiated with other carriers prior to the 1996 Act to state commissions for approval. The answer is yes. Section 252(e) states in utterly unambiguous language that "[a]ny interconnection agreement" which the ILECs have adopted "by negotiation or arbitration" shall be submitted to state commissions for approval. Section 252(a) clarifies that agreements negotiated prior to the enactment of the 1996 Act must be submitted to state commissions under Section 252(e). The FCC should affirm that these provisions mean what they say, and that any "requesting telecommunications carrier" is entitled under Section 252(i) to enter into those agreements upon the same terms and conditions. The FCC should establish an immediate deadline by which ILECs must submit all such agreements currently in effect, and all agreements in effect on February 8, 1996 when the 1996 Act was enacted to the proper state authorities to avoid the initiation of FCC enforcement actions.[99]

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matter of state law and one over which Commission lacks jurisdiction).

[99] The Colorado Public Utilities Commission established rules requiring that any interconnection agreement negotiated prior to February 8, 1996 be submitted to the state pursuant to Section 252(e). See "Emergency Rules Establishing Procedures Relating to the Submission for Approval of Interconnection Agreements Within Colorado Negotiated By Telecommunications Providers Before February 8, 1996,"

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D. The FCC Should Adopt A Single Set of Rules That Govern Generally Available Terms and Conditions

[NPRM, para. 36.] The FCC asks whether its rules should apply to the ILECS' generally available terms and conditions as well as to co-carrier arrangements arrived at through arbitration. CompTel supports establishing a single set of national rules to govern both types of co-carrier offerings. Indeed, if states direct the ILECS to tariff the terms and conditions in the agreements subject to arbitration, which Colorado has done and which CompTel supports, there will be few if any distinctions between agreements approved after arbitration and the ILECs' generally available terms and conditions.[100]

E. The FCC Should Adopt Rules To Implement The Nondiscrimination Principle In Section 252(i)

[NPRM, paras. 155, 269-272.] The FCC asks for comment on how it should interpret and apply Section 252(i), which provides that any "requesting telecommunications carrier" is entitled to enter into any co-carrier agreement for interconnection under Section 251(c)(2) or network elements under Section 251(c)(3) on "the same terms and conditions as those

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before the Colorado Public Utilities Commission, 4 CCR 723-43.

100 For a discussion of the issue whether the tariffing of co-carrier terms and conditions is consistent with the 1996 Act, see Section VII.A., supra.

provided in the agreement." This provision is among the most important in the statute, as it seeks to ensure that all carriers are able to purchase services and facilities through co-carrier agreements with ILECS on the same terms and conditions as any other carrier.[101]

It is essential that the FCC not inject any limitations or restrictions into this provision that Congress did not place there. In particular, the FCC should not re-write the term "any requesting telecommunications carrier" to apply only to similarly-situated carriers. **[NPRM, para. 270.]** This would simply encourage the ILECs to engage in discrimination among competing carriers and spawn needless litigation. It also misses the point of the 1996 Act, which is that all telecommunications carriers are by definition "similarly-situated" when it comes to purchasing services and facilities from ILECs. Subject to cost-based deviations, no carrier should pay more than any other carrier when it purchases the same service or facility from the same ILEC.

CompTel supports the FCC's tentative conclusion that it should not permit ILECs to write restrictions into agreements regarding the nature of the carrier who may subsequently enter into the same agreements under Section 252(i). **[NPRM, para. 270.]** Once again, such restrictions would conflict with Congress' deliberate choice of the broad term "telecommunications

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101 <u>See</u> pages section III.G., <u>supra</u>.

carrier" to describe those carriers who may enter into any agreement between an ILEC and another carrier for interconnection or network elements.

Lastly, CompTel encourages the FCC to adopt expedited procedures whereby carriers may complain to the FCC when ILECS refuse to make agreements available to them in violation of Section 252(i). Such procedures should be non-exclusive so that carriers may select the option of bringing their complaints to the relevant state authorities. Further, the FCC should adopt the policy that ILECs may insist only upon the enforcement of "terms and conditions" which are material under the provisions of the 1996 Act, such as terms relating to price or the technical configuration of the service to be provided. It would defeat the purpose of this provision if ILECs are able to write customer-specific or other unique terms into agreements that do not relate to the essential terms of the agreement for the sole purpose of preventing other carriers from subscribing to the same agreement. The FCC should clarify that an ILEC may not insist upon the observance of any term or condition which is not reasonable in the context of the requesting carrier.

F. The FCC Should Adopt The Policy That Interested Parties May Participate As Of Right In Arbitration And Review Proceedings

[NPRM, paras. 264-268.] Although CompTel agrees that the FCC should strive to avoid interfering in the procedures established by the states to fulfill their statutory duties under

Section 252(e), there is a strong federal interest in ensuring that a meaningful record is compiled so that the FCC may exercise its oversight responsibilities, including assuming the role of the state commission if its fails to act to carry out its statutory duties. Therefore, the FCC should establish a uniform national policy that all "interested parties" are entitled to participate in all state proceedings subject to Section 252(e). Further, the FCC should adopt a broad definition of the term "interested party" to include any "telecommunications carrier" (or association thereof) who may be entitled to enter into a co-carrier agreement with the ILEC pursuant to Sections 251(c) and 252(i).

Conclusion

For the foregoing reasons, CompTel respectfully submits that the FCC should adopt the statutory interpretations and implementing rules specified herein.

Respectfully submitted,

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May 16, 1996

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